OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 92-6 May 19, 1992

TO : All Regional Directors, Officers-in-Charge, and Resident Officers

FROM : Jerry M. Hunter, General Counsel

SUBJECT: Matters Raised by the ABA Practice and Procedure Committee at the 1992 Mid-Winter Meeting

At the mid-winter meeting, the Practice and Procedure Committee of the ABA raised some general questions about our field operation to which we responded. These questions and our responses are summarized in this memorandum.

Settlement Negotiations

The Committee raised a number of concerns regarding the settlement process including:

1. The limited involvement of the charging party in settlement discussions prior to the acceptance of a settlement proposal by charged party.

2. Inadequate time being provided to charged party, e.g., 24 to 48 hours, in order to consider settlement prior to issuance of complaint.

3. The absence of consistent post-complaint settlement efforts on the part of the Regions, particularly in the period 3 to 4 weeks before the trial.

With regard to the first issue, I informed the Committee that while we are proud of the 93.2 percent settlement rate obtained by the Regions prior to the issuance of complaints, this settlement rate would not have been accomplished without the cooperation of the parties. In this regard, I reaffirmed the charging party's role in settlements. As you know, the Casehandling Manual in Section 10128.6 discourages joint conferences of the parties during the initial settlement discussions and states in part that "Generally, settlement discussions, to be most effective, should be conducted with the respondent alone, or with its representative or counsel." However, such casehandling guidance does not mean that the charging party has no right to input concerning the terms of the settlement agreement. Obviously, such input can be very valuable in crafting a resolution of the dispute. In this regard, we should also continue to send the charging party a copy of any proposed settlement agreement that is forwarded to the charged party.

Turning to the second issue, we have long recognized that the parties have to be provided with an adequate opportunity to explore settlement possibilities if we are to have a successful settlement program. In this regard, the Regions have been provided with a reasonable time period to settle cases once a meritorious determination has been made. Thus, there is a 15-day guideline from the date of the determination to the issuance of the complaint to settle the case. However, the allotted time period may be less where settlement had been explored prior to the determination or where, in the Region's judgment, an appropriate settlement will not be forthcoming. On the other hand, this period can exceed 15 days if, in the Region's judgment, it would be warranted. It would appear that in the vast majority of cases the parties are being provided with a reasonable opportunity to explore settlement since the national settlement rate for Fiscal Year 1991 was 93.2 percent.

Finally, regarding settlement efforts after the issuance of complaint, the role of the settlement coordinator appears to be unclear to the practitioners. The settlement coordinator's responsibilities are set out in Memorandum 76-10 dated April 16, 1976. Please provide a copy of the memorandum to your settlement coordinator. In addition, please reemphasize the role of the coordinator during your next staff training session. The ABA Committee suggested the scheduling of a settlement conference 3 to 4 weeks before the hearing. While the idea of scheduling a settlement conference in all cases 3 to 4 weeks before hearing has some appeal, I informed the Committee that our experience in this area indicates that not all parties are amenable to this type of conference or even prepared to undertake detailed settlement discussions 3 to 4 weeks before hearing. Where the parties are interested in a settlement conference at that time, we would, of course, accommodate them in the hope of settling the matter and conserving resources. I emphasized the important role of the Regional Directors in conducting settlement conferences as well as the positive contributions of the administrative law judges in pretrial settlement conferences. I expect that no case will proceed to trial without a serious settlement effort by the Region prior to the expenditure of resources in pretrial preparation.

Investigation of ULP Cases

During a discussion of the cooperation by the charging party required during a ULP investigation, a question was raised regarding the right of counsel to be present at sessions where affidavits are taken. As provided in CHM Section 10056.1, counsel for the charging party has the right ". . . to be present during the interview of the charging party or any supervisor or agent whose statements or actions would bind the charging party. This policy will normally apply in circumstances where during the interview counsel or other representative does not interfere with, delay, or impede the Board agent's investigation." Also, where an agent of the party client or the client is giving affidavit testimony, counsel may request to confer and thereafter confer with the agent in private.

With respect to the actual taking of the affidavit, it continues to be the policy of the General Counsel that the words of the witness be recorded in the affidavit rather than a paraphrasing of the words by the Board agent.

Hearing Officers' Discretion to Grant Extension

The complaint we received is that hearing officers in representation cases generally do not have the authority to grant more than 7 days from the close of the hearing for filing briefs. Section 102.67 of the Board's Rules and Regulations gives hearing officers the discretion to grant, for good cause shown, extensions of time up to 14 days beyond the 7 days which is specified in that section. While it has been our experience that 7 days is quite sufficient in most cases, please ensure that hearing officers are trained to provide additional time, within the limits of the Rules and Regulations, where good cause is adequately demonstrated.

Skip Counsel

Some practitioners reported experiences where Board agents directly contacted clients after notices of appearance had been filed with the Region. The Manual in Section 10056.6 contains the policy to be followed where respondent is represented by counsel or other representative and cooperation is being extended to the Region in connection with the investigation. Please reemphasize this policy during a staff training session in the near future.

Ex Parte Communications between Counsel for the General Counsel and the Administrative Law Judge

There appears to be widespread belief that ex parte communications are occurring between the administrative law judge and counsel for the General Counsel. As you know, ex parte communications are prohibited by the Board's Rules. (Sections 102.126 through 102.133.) While we know of no such communications, this is a sensitive area and one where an occasional refresher training session is worthwhile. Consequently, please conduct a staff meeting on this subject regarding the definition and the scope of prohibited ex parte communications, as well as the manner of avoiding such communications.

Withdrawal and Refiling of ULP Charges

A number of practitioners continue to believe that charges are withdrawn and refiled in many Regions to meet time targets. We reiterated our policy that unless a charging party in a ULP case or a petitioner in an R case is ready to proceed in a timely manner with the case, it should be withdrawn. However, it should never be withdrawn to meet time targets. We re-emphasize therefore that where a party is being solicited by a Board agent to withdraw a charge or petition solely to meet the Agency's performance goals, such request is totally inappropriate.

ULP Issues Submitted to Advice

A concern was once again raised that practitioners are not being advised of issues submitted to the Division of Advice. Memorandum OM 90-15 dated March 2, 1990 sets forth our policy that the Regions are to give the parties notice that a case is being submitted to Advice. The notice is to include the issue(s) being submitted.

Handwritten Affidavits

While we did not agree with a request to have handwritten affidavits typed for trial, we did agree that if the Regional Office has a typewritten copy of the affidavit, we would produce it for Jencks purposes with the handwritten affidavit.

Filing Briefs in Resident or Subregional Office

The Committee again requested that practitioners be permitted to file briefs in the Resident or Subregional Office as well as in the Regional Office. Many Regions have been accepting documents as timely filed when they are filed in the Resident or Subregional Offices. Further, the Board has found that objections filed with a Resident Office were in fact filed "with the Regional Director" within the meaning of Section 102.69(a) of the Board's Rules and Regulations. See Piggly-Wiggly, 258 NLRB 1081 at 1085 (1981) and Henry I. Siegel, Inc., 165 NLRB 493 (1967). Thus, even though Section 102.111(b) of the Board's Rules and Regulations considers briefs timely filed if they are postmarked 1 day before the due date, we believe for purposes of consistency that the Regions should permit the filing of briefs in the Resident or Subregional Offices as well as in the Regional Offices.

The meeting with the ABA Committee once again confirmed that the Office of the General Counsel and the Regional Offices are effectively administering the Act. The relative infrequency of serious problems raised by the Committee demonstrates that you and your staffs are aware of Agency policies and procedures and are dealing with the parties and their representatives in a fair and respectful manner. As I have noted previously, our relationship with the ABA Committee is a continuing one and I will be pleased to pass on to the Committee any comments you may have with respect to the matters discussed in this memorandum or any other appropriate concerns that you may have.

Jerry M. Hunter